Statement of Lawrence E. Walsh before the
United States Senate Committee on Governmental Affairs
Hearing on the Future of the Independent Counsel Act

Wednesday, March 24, 1999, 9:30 a.m.
Hart Senate Office Building, Room 216

Mr. Chairman and Senators,

I appreciate the invitation to appear before you and submit my views regarding the renewal of the independent counsel law.

From December, 1986 until January, 1993 I served as independent counsel for the Iran/contra matter. My active investigation was completed in February, 1992. My report was submitted August 7, 1992 but it was not released until January, 1993, after the court had heard arguments against release and had received for simultaneous release, responses from all of those mentioned adversely in the report. My experience before appointment was evenly divided between government appointments and private practice. My private practice was primarily litigation, trial and appellate. My government work included six years in prosecutorial offices, one year as director and general counsel of the Waterfront Commission of New York Harbor, an investigative and regulatory body, three and a half years as a United States district judge and three years as deputy attorney general of the United States. While in private practice I conducted investigations for Governor Nelson Rockefeller and for the New York State Court on the Judiciary.

As to the basic question of whether the act should be renewed, I respectfully recommend that it be drastically narrowed but continued for three purposes: First, to avoid the appearance of an attorney general under investigation naming the person who is going to investigate him or her or having a subordinate do it, second, to prevent an attorney general from selecting the person who is to investigate the president who appointed him or her, and third, to prevent an independent counsel from being arbitrarily discharged by the person he is investigating or at the direction of the person he is investigating.

These three concerns are not fanciful. Since World War II only five independent counsel have investigated a president; two were dismissed; two of us have been investigated by the displaced attorney general; only Leon Jaworski was unmolested. Not protected by statute, Archibald Cox was fired arbitrarily by the acting attorney general pursuant to an order from the president whom Cox was investigating. Robert Fiske was replaced arbitrarily in the middle of his investigation of President Clinton, by a three judge panel under circumstances not yet convincingly explained. Judge Kenneth Starr is now reported to be under investigation by the attorney general but he is protected by the statute which permits discharge only for cause and he may request a judicial hearing. Similarly, I was so protected when I was twice investigated by the criminal division of the department of justice at the direction of the attorney general. In summary, except for Leon Jaworski, everyone who has served as independent counsel investigating a president has been subjected to meaningful attacks and the danger of removal. Only those of us protected by the statute survived. The investigation of a president is likely to be difficult, protracted and

controversial. It is an uninviting job. The person who takes it should not be dependent on the tolerance of the person he is investigating or that person's subordinates.

Neither should the public be misled. The appearance of an attorney general selecting the person to investigate himself or the president who appointed him lacks the public credibility of an appointment by someone less interested in the outcome. Historically, more often than not, there has been a close relationship between the president and his attorney general. Herbert Brownell was President Eisenhower's campaign manager and continued to be his political advisor. John Mitchell had a similar relationship with President Nixon. Robert Kennedy had, of course, an even closer relationship with President Kennedy. Attorney General Meese was a close personal counselor to President Reagan and, in the Iran/contra matter, he advised President Reagan on some of the questioned transactions and he guided those close to the president when he perceived the danger of impeachment. Should a statute which presently protects against such an apparent conflict of interest be abandoned without something better to take its place?

Stripping the act to its essentials and then renewing it would be in the national interest. Several of us who have acted as independent counsel feel that the act is not necessary for the investigation of office holders other than the president and attorney general. Except for these two officials, the department of justice should not be displaced. Even before the exposure of the Lewinsky matter, we also argued that the expense and intensity of an independent counsel's investigation should be reserved for an investigation of an abuse of public office, an investigation of specific and credible evidence that the president or attorney general committed a crime in connection with his or her discharge of official duties. Investigation of matters which occurred before a president was elected or an attorney general appointed, we believe, should be left for prosecution after they leave office by regularly appointed prosecutors. The statute of limitations should be suspended during their time in office to permit such a delayed prosecution. Similarly, the investigation of personal misconduct of a president unrelated to the discharge of official duties, should be deferred until after he is out of office and then it should be handled by regularly appointed prosecutors. The statute of limitations on any such act should be suspended during his presidency. The prosecutorial disadvantage of stale evidence is outweighed by the national interest in an uninterrupted presidency by the person elected by the people.

If the statute is to be continued, there will be an opportunity for improvements. The present three judge appointing unit should be replaced. It has always been a risky constitutional venture to permit three judges of limited jurisdiction to make an appointment to an executive branch position -particularly of the person to conduct an investigation of a president. The analogy of a district court appointing an acting United States attorney during a temporary vacancy has been overextended. The governmental body to appoint the independent counsel to investigate a president should have national stature and its members should be appointed by the president and confirmed by the senate. Such an agency, if this committee believes it desirable, could also have limited oversight of an independent counsel without incurring the constitutional problems of a judicial unit attempting such supervision. While I do not favor curtailing the independence of independent counsel, and I believe it undesirable to let him share his responsibility, I simply recognize that there is strong support for such a change.

If such a change were made, the renewed statute should prescribe the qualifications of the appointees to a small new agency which could be lodged in the department of justice. By requiring Senate confirmation, those responsible for appointing an independent counsel would receive true scrutiny- public scrutiny, as distinguished from the present system, whereby the chief justice appoints three judges at will, with no public scrutiny of the appointing process.

Less basic criticisms of the act have accumulated. Having worked under it, however, I was satisfied with it. My biggest handicap was lack of control of the declassification of non-secret government information but I believe this to be a separate subject which should not intrude in this committee's more basic decision as to the survival of the act.

To sum up, the advantages of continuing a stripped down statute are that it distinguishes investigations of an attorney general and the president from those of other government officers. Second, it would provide for a credible source of appointment for an independent counsel to investigate those officers. Third, it would protect the independent counsel from arbitrary discharge. Fourth, if desired by congress, the new agency for the appointment of independent counsel could exercise oversight regarding them.

Once again, I thank the committee for this opportunity to state my views.